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Supreme Court, U.S.
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Supreme Court of the United States

ESTATE OF TARIK K. RODGERS, by and through the administrators Michael Rodgers and Brenda Rodgers; MICHAEL RODGERS, as parent of the decedent; BRENDA RODGERS, as parent of the decedent,

Petitioners

v.

STEVE SMITH, individually and in his official capacity as Chief of Police of the City of Williamston Police Department, North Carolina; et al

Respondents

PETITION FOR WRIT CERTIORARI

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QUESTIONS PRESENTED

I Was the deceased Rodgers seized under the Fourth Amendment when several police officers surrounded him with their vehicles and in person, released a policy dog on him and discharged their weapons at him?

II Did the Fourth Circuit err when in concluding that Rodgers' death, which occurred as a result of police gunfire after a police dog attacked, was reasonable under the Fourth Amendment.

III. Did the Fourth Circuit err when it upheld the District Court's grant of summary judgment, even when the police shooting which caused Rodgers' death occurred under circumstances where the Fourth Circuit concluded Rodgers may have been attempting to surrender to police?

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PARTIES TO THE PROCEEDINGS BELOW

KEITH ROACH, individually and in his official capacity as the Sheriff for Martin County; WALTER J. FARROW III, individually and his official capacity as a Martin County Deputy Sheriff; WILLIAM R. WATERS JR., individually and in his official capacity as a Williamston North Carolina police officer; MELANIE COX, individually and in her official capacity as a Williamston North Carolina police officer; CHARLIE BROWN, individually and in his official capacity as a Williamston North Carolina police officer; ELVIE FORNEY III, individually and in his official capacity as a Martin County Deputy Sheriff; BRIAN EDMONDSON, individually and in his official capacity as a Martin County Deputy Sheriff; BRIAN HARDISON, individually and in his official capacity as a Williamston North Carolina police officer; TRAVIS COWAN, individually and in his official capacity as a Williamston North Carolina police officer; STACEY PIPPIN, individually and in his capacity as a Williamston North Carolina police officer; DAVID CROSS, indvidually and in his official capacity as a Martin County Deputy Sheriff; THE CITY OF WILLIAMSTON, NORTH CAROLINA.

Respondents

DONNIE PITTMAN, individually and in his official capacity as the County Manger for Martin County, North Carolina; MARTIN COUNTY, NORTH CAROLINA.

Respondents

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STATEMENT OF JURISDICTION

Petitioner, Estate of Tarik K. Rodgers, alleged that various Martin County and City of Williamston police officers; namely Steve Smith, et al., the Respondents used excessive force in effecting the arrest of the Decedent, Tarik K. Rodgers. The Estate of Tarik K. Rodgers brought claims against Steve Smith, et al., under 42 U.S.C. § 1983 for a violation of the Decedent's Fourth Amendment rights. The United States District Court for the Eastern District of North Carolina had jursdiction over Decedent's federal civil rights claims by virtue of 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights action).

The Estate of Tarik K. Rodgers also sought relief from the Respondents for the state law claims of wrongful death and the torts of assault and battery, gross negligence, and, the intentional infliction of emotional distress. The district court had jurisdiction to hear these claims under 28 U.S.C. § 1367(a).

On March 3, 2005, the District Court entered summary judgment in favor of the Respondents on the Estate of Tarik K. Rogers' § 1983, The Estate of Tarik K. Rodgers' state law claims were dismissed pursuant to 42 U.S.C. § 1367(c)(3). The Estate noted a timely appeal to the United State Court of Appeals for the Fourth Circuit. On June 26, 2006 the United States Court of Appeals affirmed the judgment of the District Court. (Pet. App. 2a)

Jurisdiction in this Court is established by 28 U.S.C. § 1291 and 28 U.S.C. § 1331 (Federal Question Jurisdiction).

STATEMENT OF THE CASE

On April 15, 2002, Decedent Tarik K. Rodgers was attacked by a police dog, Officer Brejhar, which was under the custody and control of William R. Waters, Jr., a City of Williamston, North Carolina Police Officer. At the time of the attack, the Decedent was standing outside of his disabled vehicle, with his hands in the air without any weapon therein. Officer Waters admits that he did not give a verbal warning to the Decedent prior to releasing the police dog upon him. (Pet App. 6a-7a) This incident occurred in a residential area in Williamston, North Carolina, and there were several civilian eyewitnesses including the alleged kidnapping victim, Angela Freeman. The Decedent, without provocation and while struggling from the attack of the police dog was shot eight (8) times at point blank range to the head and torso. Throughout the opinion of the Fourth Circuit, a police vehicle video is referenced. That video was a prominent part of all the proceedings below and is available to the Court at anytime it desires to have it available for viewing. The shots perforated Rodgers' heart, brain and lungs, killing him. (Pet.App. 7-8)

On April 4, 2003, the Estate of Tarik K. Rodgers filed a lawsuit in the United States District Court for the Eastern District of North Carolina. That suit included claims against William R. Waters, Jr. and the City of Williamston, North Carolina Police Department, as well as Martin County, Martin County Sheriff Keith Roach, several Police Officers employed by the City of Williamston Police Department and the Martin County Sheriff's Department.

The Petitioner filed the complaint on April 4, 2003,

alleging that following claims: (1) violations of constitutional and civil rights pursuant to 42 U.S.C. § 1983; (2) wrongful death; (3) conspiracy to violate constitutional rights pursuant to 42 U.S.C. § 1985; (4) gross negligence; and (5) assault, battery, and intentional infliction of emotional distress. On April 17, 2003, The Martin County Defendants filed a partial motion to dismiss. On May 30, 2003, the Williamson Defendants filed a partial motion to dismiss. By order of Court dated January 15, 2004 the Court stayed discovery against the City of Williamston and Martin County Sheriffs Department pending the resolution of Defendants qualified immunity defenses.

On March 17, 2004, the District Court issued an order, which dismissed all claims pursuant to Rule 12(b)(6) except for those violations of 42 U.S.C. § 1983 and state law claims for wrongful death, gross negligence, assault, battery and intentional infliction of emotional distress, against the following Defendants: the City of Williamston, Sheriff Roach in his individual and official capacities, and Defendants Smith, Farrow, Waters, Cox, Brown, Forney, McFarlane, Edmondson, Hardison, Cowan, Pippin and Cross in their individual capacities.

On December 1, 2004, the Martin County Defendants (Roach, Farrow, McFarlane, Edmondson, Pippin and Cross) filed a motion for summary judgment. Defendants Smith, Waters, Cox, Brown, Forney, Hardison, Cowan and the City of Williamston ("Williamston Defendants") filed a separate motion for summary judgment on that same day.

On March 3, 2005, the court filed a memorandum opinion and order, which granted summary judgment in favor of all Defendants on the claims, which were filed under § 1983. The court based its decision upon the plaintiff's failure to make out a claim under the substantive due process clause. Having divested itself of pendant jurisdiction, the court dismissed all of the remaining state law claims.

The Estate noted a timely appeal to the United States Court of Appeals for the Fourth Circuit. On June 26, 2006 the United States Court of Appeals affirmed the judgement of the District Court. (Pet.App. 1) Jurisdiction in this Court is established by 28 U.S.C. § 1291 and 28 U.S.C. § 1331 (Federal Question Jurisdiction).

STATEMENT OF FACTS

Decedent Tarik K. Rodgers was a 26-year-old, 5'9", 230 lb. black male who resided across the street from the Martin County Governmental Center in Williamston, Martin County, North Carolina, United States of America. On the date of the incident, Decedent Tarik K. Rodgers was gainfully employed and the father of two (2) minor daughters, Ashanti and Quinn. (Pet.App. 4) The Decedent did not have a criminal history or a reputation in the community for criminal activity or violence and was not under the supervision of the Martin County Department of Adult Probation and Parole.

On April 14, 2002 at approximately 9:00 p.m., a domestic violence protective order was served on Decedent Tarik K. Rodgers. At approximately 10:00 p.m. Decedent Tarik K. Rodgers went to the home of Angela Freeman, the mother of his two (2) daughters to discuss his parental rights. Upset about receiving the order, Decedent Tarik K.

Rodgers forcibly removed Freeman from her residence, placed her in his champagne colored Mitsubishi Diamante, bearing a North Carolina registration plate and drove her out to the area of Prison Camp Road. (Pet.App. 4).

On the way to Prison Camp Road, Decedent Tarik K. Rodgers and Freeman discussed the domestic order and the two of them were able to determine that it was a misunderstanding. Consequently within 15 to 20 minutes of Decedent Tarik K. Rodgers and Freeman being together, they were able to settle their differences. Freeman and Decedent Tarik K. Rodgers make up and even engaged in consensual sex while out on Prison Camp Road. (Pet.App. 4).

Decedent Tarik K. Rodgers had stated to Freeman that he wanted to go home and was headed there when Defendant Cross spotted him and the high speed chase began outside of the city limits of Williamston, North Carolina. The chase was soon joined by Martin County Deputy Sheriff Walter Farrow, who was on his way home after leaving the residence of a female companion. (Pet.App. 4).

Farrow was off duty at the time he decided to engage in the high speed vehicular pursuit of Decedent Tarik K. Rodgers. Soon after Farrow join the chase, it was also joined by Williamston Police Officers Sergeant William Waters, Elvie Forney, Melanie Cox, Detective Charles Brown, Roanoke-Chowan Narcotics Task Force Agent Scott McFarlane.[1] Unable to reach home safely, because of the

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[1]Plaintiffs police practice expert, Robert W. Klotz, stated in his August 18, 2004 Preliminary Expert Report at p.4-5, that the pursuit of Decedent Tarik K. Rodgers was carried out to apparent violation of the

hot pursuit of officers driving at speeds in excess of 90 to 100 mph through areas in and outside of the City of Williamston, Decedent Tarik K. Rodgers decided that it was time to end the pursuit, so he then tapped on his brakes causing the vehicle presumably driven by Waters to collide with the rear of his vehicle. After the collision Decedent Tarik K. Rodgers' vehicle came to rest on Roberson and W. Main Streets next to CBs Laundromat and Car Wash. The intersection of Roberson and W. Main Street was well illuminated as there was and is a street light and external lights on the exterior of the car wash bays, all of which were operational and on April 15, 2002, Moreover, Williamston Police vehicles are equipped with videotaping equipment, which is activated by turning on the emergency lights of said police vehicles. (Pet.App. 4-5).

After Decedent Tarik K. Rodgers' vehicle came to a rest, Brown approached Decedent Tarik K. Rodgers' vehicle and using his service revolver knocked on the driver's side window, attempting to break it. Decedent Tarik K. Rodgers, responding to the officer's commands that he exit the vehicle, voluntarily opened the door to his vehicle with the assistance of officers because the door had been initially jammed after the crash. Brown then attempted to remove Decedent Tark Rodgers from the vehicle by grabbing Decedent Tarik K. Rodgers' clothing and tearing his shirt.

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mutual aid agreement since several members of the Williamston Police Department left their area of jurisdiction and entered into the County to assist in the pursuit without the appropriate authorization and that the pursuit was carried out in a manner contrary to the national police standards.

Initially K-9 Officer Brejhar ran past Decedent Tarik K. Rodgers who was still seated in his vehicle and attacked Roanoke-Chowan Drug Task Force Agent Scott McFarlane. The K-9 officer was able to subdue McFarlane with one bite. After retrieving the K-9 Officer Brejhar off of McFarlane, Sgt. William Waters without giving any warning or verbal commands to the Decedent Tarik K. Rodgers deployed K-9 Officer Brejhar to attack Decedent Tarik K. Rodgers by walking the K-9 officer up to within 5 feet of where Decedent Tarik K. Rodgers was standing. At the time of this unprovoked attack Decedent Tarik K. Rodgers had exited his vehicle with his hands up and without a weapon of any kind therein. The K-9 Officer Brejhar then attacked Decedent Tarik K. Rodgers biting him several times on his hands, legs and waistline. (Pet.App. 5-6).

Decedent Tarik K. Rodgers' attention was immediately focused on the K-9 officer that was inflicting what had to have been excruciating and torturous pain upon him[2] and from which he was attempting to protect himself. Then suddenly and without warning while Decedent Tarik K. Rodgers was either falling or already on the ground being subdued and apprehended by the K-9 Officer Brejhar, Waters and Farrow then drew their weapons and suddenly and without warning, fired shots at close range into Decedent Tarik K. Rodgers' head and torso. At the time Waters and Farrow fired their weapons both the K-9 officer,

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[2]The force of a police dog's bite is between 1,200 and 2,000 pounds per square inch. See Douglas U. Rosenthal, Note, When K-9s Cause Chaos – An Examination of Police Dog Policies and Their Liabilities, 11 N.Y.L. Sch. J. Hum. Rts. 279, 296 (1994).

which was still on Decedent Tarik K. Rodgers' waist and Freeman were in the line of fire. Decedent Tarik K. Rodgers was struck eight (8) times, causing perforation of his heart, brain and lungs, which proximately resulted in his death.[3] He had no pulse and no respirations at the scene. (Pet.App. 8).

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant review in this case not only because the majority opinion of the Fourth Circuit is fundamentally unsound, but, by the Courts own admission, it is in conflict with other United States Circuit Court of Appeals on important matters concerning the use of force on police officers and the use of police dogs during the arrest. See Supreme Court Rule 10. Further, the Fourth Circuit in its reasoning in deciding the important federal question concerning the Fourth Amendment had departed from accepted judicial reasoning and announced a decision, that if adopted, would sanction police conduct that would often lead to results that are both disastrous and unnecessary.

The analysis of the Fourth Circuit regarding what constitutes a constitutionally reasonable seizure under the Fourth Amendment would allow police to exercise their great discretion to use deadly force without appropriate restraint. The majority opinions short-sighted analysis concluding that Mr. Rodgers was not "seized" for Fourth Amendment purposes (Pet.App. 9-10) is inconsistent with this Courts precedents on the subject. The Court of Appeals' decision allowing the District Court's dismissal of

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[3]See Coroner, Dr. Paul R. Spence's Autopsy Report dated August 27, 2002, at J.A. p.364-368. (on file in Fourth Circuit).

Petitioner's claims at summary judgment to stand denies him his fundamental right to a jury trial on the disputed facts in this case.

In short, all three questions presented in this case are more than erroneous facts findings or misapplications of a properly stated rule of law.

The United States Court of Appeals for the Fourth Circuit has decided important questions of federal law that should be settled by this Court to help avoid tragedy and confusion as police proceed with the use of force when handling the many domestic violence calls they receive annually. In a recent opinon from a Justice of this Court it was noted that "Family disturbance calls...constitute the largest single category of calls received by police departments each year." See Georgia v. Randolf, 547 U.S. ___ (2006). (Justice Breyer concurring) (Slip op. At 2) citing, Mederer & Gelles, Compassion or Control: Intervention in Cases of Wife Abuse, 4 Journal of Interpersonal Violence 25 (Mar. 1989). That opinion further noted a study that found one third of all police time is spent responding to and handling domestic disturbance calls. Supra, Randolph.

Because, the nature of the police interaction in the case began as a domestic disturbance call, this Court's guidance is needed to set a suitable standard for police conduct in handling such matters, particularly, when the use of police dogs and deadly force by shooting is contemplated.

Police accountability should be an important consideration in sound constitutional decision making, particularly when Fourth Amendment issues are involved. See generally, José Felipé Anderson, Accountability

Solutions in the Consent Search and Seizure Wasteland, 79 Neb L. Rev. 711, 747-761 (2000) (discussing the dangers of unchecked police discretion in Fourth Amendment seizures).

The trial court determined that Farrow could not be held liable for excessive force because he had not "seized" the Decedent Tarik K. Rodgers. The court reasoned that there could be no Fourth Amendment violation because "the plaintiffs have not come forward with any evidence that any bullets from Farrow's gun touched the Decedent, nor have they constructed an argument that would impeach Farrow's story." Under these circumstances, the Fourth Amendment is simply not implicated in the case."

Relying on California v. Hodari D, 499 U.S. 621 (1991), and having found that there was no underlying violations by the officers, McFarlane, Edmondson, Cross, Pippin and Roach, the court granted summary judgment in favor of these Defendants as well.

The trial court and the Fourth Circuit both erred in finding that there had been no Fourth Amendment seizure in this case. This Court has defined a seizure as a "governmental termination of freedom of movement through means intentionally implied." Brower v. County of Invo, 489 U.S. 593, 596-597, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989). An objective test is to be applied in determining whether the means of a seizure was intentionally applied, and a seizure will be held to have occurred even when an unintended person or thing is the object of the detention. Id. Because Officer Farrow had the objective intent to make a seizure by firing his weapon at the unarmed Decedent who was already under the attack of a K-9 Officer and surrounded by several officers with their

guns drawn, the Fourth Amendment is applicable. It should be noted that full discovery or limited discovery has not been effected on key probative areas in this case (review of forensic evidence, Williamston and Martin County Sheriffs' departmental history of similar incidents, other dog bite incidents, adequacy of officer training, negligent hiring and supervising etc.). Farrow acting in concert with the other Defendants would clearly not be entitled to judgment as a matter of law as there are material facts in dispute which indicate that the use of force n this case was not objectively reasonable. Graham v. Connor, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989); Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991). Such facts include that the Defendants shot the Decedent eight times in the head and torso while he was under the seizure of the K-9 officer; that the unarmed Decedent Tarik K. Rodgers had his hands in the air when he was viciously attacked by the K-9 officer that the attack by the K-9 officer occurred *without any verbal warning* from Waters; and that without any mention of seeing a gun, at least one of the Defendants stated that the Decedent was shot while the Decedent was on the ground[4] with his right hand across his waistline

The facts of this case, viewed in the light most favorable to the Plaintiff, support a § 1983 excessive force claim based on the Fourth Amendment and render summary

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[4]Angela Freeman and Defendant McFarlane's version of the shooting are consistent not only with several civilian eyewitness testimony but also it is consistent with the medical findings of the Coroner Paul Spence, M.D. Autopsy Report dated August 27, 2002 at J.A. p.364-368 indicating that 5 of the 8 gunshot wounds were downward in trajectory.

judgment inappropriate for the Defendant Waters.

The municipal Defendants each have customs and policies that are unconstitutional because they foster the use of excessive force. Accordingly, the Defendants also violated the Decedent's constitutional rights. Monell v. Department of Social Services, 436 U.S. 658, 690-691, 98 S. Ct. 2018, 2035-2036 (1978) and Handle v. City of Little Rock, 722 F. Supp. 434, 438 (8th Cir. 1991).

Each of the issues presented to this Court involve a review of the trial court's decision to grant summary judgment in favor of the Defendants. The District Court's grant of summary judgment is reviewed *de novo.* Higgins v. E.I. DuPont de Nemours & Co., 836 F.2d 1162, 1167 (4th Cir. 1988). Rule 56(c) mandates that the moving party is entitled to summary judgment only if there is no genuine issue of material fact. The facts must be reviewed in the light most favorable to the plaintiff. Mensh v. Dyer, 956 F.2d 36, 39 (4th Cir. 1991). This Court has made clear that all justifiable inferences must be drawn in favor of the non-moving party because "[c]redibility determination, the weighing of inferences and the drawing of inferences from the facts are jury functions. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court of Appeals failed to give the Petitioner the benefit of applying these legal standards.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT FARROW BASED UPON A FINDING THAT, AS A MATTER OF LAW, PLAINTIFF WAS NOT SUBJECTED TO A SEIZURE UNDER THE FOURTH AMENDMENT.

By ordered dated March 3, 2005, the District Court granted summary judgment in favor of Defendant Farrow. Applying a Fourth Amendment analysis to the facts, the court citing the dissenting opinion of Justice Stevens in California v. Hodari D, 499 U.S. 621 (1991), held that Defendant Farrow's use of deadly force by discharging his weapon but not actually shooting the Decedent did not constitute a seizure within the meaning of the Fourth Amendment. The reliance on the Justice Stevens' dissent is misplaced since Justice Stevens only stated parenthetically as dicta "**in rejecting** the majority's expanded definition of seizure that "the Court assumes without acknowledging, that a police officer may now fire his weapon at an innocent person and not implicate the Fourth Amendment as long as he misses his target" Id. at 630. Although, the Hodari majority did not reach this conclusion since Justice Scalia was careful to limit the holding to the facts of that case, Justice Stevens' rebuke and thorough review of Fourth Amendment jurisprudence makes it clear that such a definition is untenable. The Court of Appeals has misconstrued the current status of the law with respect to what constitutes a seizure for Fourth Amendment purposes.

The issue of whether the Decedent Tarik K. Rodgers was subjected to a seizure, which entitled him to the protection of the Fourth Amendment is controlled by Brower v. County of Invo, 489 U.S. 593 (1989). In Brower, as in the case at bar, the police were involved in the high-speed chase of the driver of a stolen automobile, whereas in the instant matter, the Decedent was an alleged kidnap suspect. In an effort to apprehend the suspect, the Brower police positioned a truck across the road to serve as a roadblock. The suspect collided with the truck and was

killed.

Holding that Brower had been subjected to a deliberate seizure, this Court stated that a "violation of the Fourth Amendment requires an intentional acquisition of physical control." Brower v. County of Invo, supra, at 596. The Court further stated as follows:

> It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement **through means intentionally applied [as in the case of a police officer use of deadly force by discarhing his weapon].**

Brower v. County of Invo, supra, at U.S. 596-597. **(Emphasis added)**.

An objective test is to be used in determining whether the police intentionally applied the means of a seizure. It is undisputed that Defendant Farrow intentionally discharged his weapon at least two times in an attempt to terminate the freedom of movement of the Decedent Tarik K. Rodgers. The police in Brower argued that they did not specifically intend for the plaintiff to strike the roadblock, yet they were found to have the general intent to effect a seizure as was evidenced by the fact that they placed the roadblock in the road. The Court stated that "[i]t may well be that respondents here preferred, and

indeed earnestly hoped that Brower would stop on his own without striking the barrier, but we do not think it practicable to conduct such an inquiry into subjective intent." Brower v. County of Invo, supra, at U.S. 598 (citations omitted). See also, Sturges v. Mathews, 53 F.3d 659, 661-662 (4th Cir. 1995) (no specific intent required for seizure). Because the only inquiry in assessing whether a use of force constitutes a seizure is whether or not the use of force itself was willful, "a seizure occurs **even when an unintended person or thing is the object of the detention or taking**. " Brower v. County of Invo, supra, at U.S. 596, citing, Hill v. California, 401 U.S. 797, 802-805, 28 L. Ed. 2d 484, 91 S. Ct. 1106 (1971); cf. Maryland v. Garrison, 480 U.S. 79, 85-89, 94 L. Ed. 2d 72, 107 . Ct. 1013 (1987). **(Emphasis added)**.

It is clear that, under the Brower definition of a seizure, the Decedent who was a suspected felon that was under the attack of K-9 Officer Brejhar and fired upon by at least one other defendant, Officer Waters, was again *"seized"* by Defendant Farrow who admittedly fired upon the Decedent. All that is required is that Farrow intended to terminate the freedom of movement of the Decedent through some direct physical action which substantially alters his movement. Furthermore, Petitioner contends a suspect, whose vehicle had been disabled in a collision with a law enforcement vehicle after a high speed chase, as was the Decedent in this case, and who is also **surrounded by several law enforcement officers with their guns drawn**, one of which was the Defendant Farrow, had been effectively seized notwithstanding the subsequent weapons discharge by Farrow and others. Additionally, Petitioner further contends that its position is sustained by the so-

called Mendenhall test, formulated by Justice Stewart's opinion in United States v. Mendenhall, 446 U.S. 544, 554 (1980), and adopted by the Court in later cases, see Michigan v. Chesternut, 486 U.S. 567, 573 (1988); INS v. Delgado, 466 U.S. 210, 215 (1984); "[A} person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 466 U.S. at 554. See also Florida v. Royer, 460 U.S. 491, 502 (1983) (opinion of WHITE, J.). Under the undisputed facts of this case, there is little doubt that the Decedent upon being fired at by Farrow understood the message that the he was not free to leave the scene. Hence, a Fourth Amendment seizure effected by Farrow had occurred.

In the instant matter, the Decedent Tarik K. Rodgers obviously was "seized" when he was grabbed by Officer Brown, when he was attacked and subdued without warning by K-9 Officer Brejhar and undoubtedly when he was shot **at and by** Farrow, Waters and others multiple times. In Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991), the Fourth Circuit held that the improper deployment of a police dog that mauls the target constitutes excessive force in violation of the Fourth Amendment. Kopf was decided in 1991, eleven years before the attack on Decedent Tarik K. Rodgers. Accordingly, it was clearly established in 2002 that failing to give a verbal warning before deploying a police dog to seize someone under the circumstances as presented by Petitioner is objectively unreasonable and a violation of the Fourth Amendment. Furthermore, as this Court recognized in Tennessee v. Garner, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699 (1985), "there can be no question that

apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." The pivotal question is when the use of deadly force is reasonable.

Construing the facts in this case, in a light most favorable to the plaintiff, Officer Farrow while recklessly standing upon the hood of his patrol vehicle [by his own admission, out of fear of the K-9 Officer Brejhar] participated with others in firing twenty-three (23) shots at an unarmed, compliant suspect, who was on the ground under the vicious attack of K-9 Officer who had already bitten Officer McFarlane and incapacitating him with one bite.

Petitioner respectfully offer that it is inconceivable under the conflicting circumstances of this case that the Defendant Farrow is entitled to summary judgment on the basis of qualified immunity. Decedent Tarik K. Rodgers was subjected to a seizure as a matter of law by Defendant Farrow, and should be entitled to have his § 1983 claims assessed under a Fourth Amendment analysis.

II. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT WATERS AND BROWN WERE ENTITLED TO QUALIFIED IMMUNITY FROM CLAIMS UNDER 42 U.S.C. § 1983 WHERE THERE WAS EVIDENCE THAT THEIR CONDUCT WAS OBJECTIVELY UNREASONABLE AND WHERE NO REASONABLE PERSON WOULD HAVE THOUGHT THAT THEIR ACTIONS WERE LAWFUL.

The defense of qualified immunity may be applied in cases involving excessive force in violation of the Fourth

Amendment. Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 191). Police officers are entitled to judgment on the defense of qualified immunity only if they can establish that their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have know." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Police officers "are not entitled to summary judgment on qualified immunity if in light of pre-existing law the unlawfulness [of their conduct] was apparent." Kane v. Hargis, 987 F.2d 1005, 1007 (4th Fir. 1993), citing, Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

At the time of Decedent's arrest, it was clearly established that the amount of forced used in making an arrest must be reasonable. Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). An objective standard is applied in determining whether a particular use of force was reasonable. This Court has articulated that standard as follows:

> [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an unreasonable use of force constitutional.

Graham. Supra. at U.S. 397. (citations omitted)

The Fourth Amendment to the U.S. Constitution prohibits the unreasonable seizure of persons by law enforcement authorities. Graham v. Connor, 490 U.S. 386,

396, 109 S. Ct. 1865, 1872 104 L. Ed. 2d 443, 451 (1989) In an excessive force case, the specific inquiry "is whether a reasonable officer could have believed that the use of force alleged was objectively reasonable in light of the circumstances." Rowland v. Perry, 41 F.3d 167, 173 (summary judgment inappropriate where officers beat a retarded suspect during arrest for stealing a five dollar bill). The court must evaluate whether the "totality of the circumstances" justified the particular sort of force employed. Tennessee v. Garner, 471 U.S. 1, 8-9, 105 S. Ct. 1694, 1700, 5 L. Ed. 2d 1 (1985).

III. THE TRIAL COURT ERRED IN FINDING THAT MARTIN COUNTY SHERIFF KEITH ROACH, WILLIAMSTON CITY AND WILLAMSTON POLICE CHIEF STEVE SMITH WERE ENTITLED TO BE DISMISSED FROM CLAIMS UNDER 42 U.S.C. § 1983, AS WELL AS THAT THESE DEFENDANTS WERE ENTITLED TO BE DISMISSED FROM CLAIMS N.C.G.S. § 28A-18-2 WRONGFUL DEATH CLAIM; GROSS NEGLIGENCE CLAIM; ASSAULT, BATTERY, AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WITH A REQUEST FOR PUNITIVE DAMAGES CLAIMS.

By order of Court dated January 15, 2004, the Court stayed discovery against the City of Williamston and Martin county Sheriffs Department pending the resolution of Defendants qualified immunity defenses.

Plaintiffs further contend that the use of force in the

instant case was excessive and that the actions of Defendants Farrow, Brown, and Waters were not objectively reasonable under the circumstances and thus Plaintiffs should be permitted to conduct full discovery upon the Court's denial of the reversal of the District Court's granting of the Defendants' summary judgment motions.

The District Court was well aware that the Plaintiffs also sued certain of the Defendants under Monell v. Depart. of Social Services, 436 U.S. 658 (1978), which established that municipalities and counties could be liable for constitutional deprivations under § 1983. This Circuit has found that municipal liability "is derivative of, but narrower than" the liability of individual officers. Kopf v. Wing, 942 F.2d 265, 269 (4th Cir. 1991) (citing Spell v. McDaniel, 824 F.2d 1280 (4th Cir. 1987)). Thus, the Plaintiffs contend that we can prevail on our Monell claim once we prove that Defendants used excessive force against the Decedent and this use of force was caused by an unconstitutional custom or practice of the City of Williamston and Martin County Sheriffs Department.

The Fourth Circuit, while admitting the case was tragic, ignores the practical consequence of its decision. (Pet.App. 17) It allowed the police departments involved through its officers to kill Rodgers without adequate accountability, even though the majority opinion by Chief Judge Wilkins concluded that "It is possible, as the Estate contends, that Rodgers was attempting to surrender when he was engaged by the police dog and shot by the officers." (Pet.App. 17) This shocking conclusion requires this courts review.

The Fourth Circuit erred when it narrowly defined

whether a seizure had occurred in this case. Does this nation really embrace a rule of law that allows police this much latitude to use deadly force? Examination of Petitioner's body revealed that he "had been shot multiple times in the head and body. He also exhibited bite marks on his right arm, hand, abdomen, and thigh." (Pet.App. 8).

Rodgers' conduct was consistent with surrender, as admitted by the majority opinion, a witness heard Rodgers' say "hold up as he tried to get out." (Pet.App. 8) The fact that several different police agencies were involved in the pursuit and investigation of Rodgers provides another compelling reason for this Courts review since this type of multiple department pursuit is likely to recur all over the country, guidance should be offered by this Court.

The Fourth Circuit readily admits that to affirm the District Court's decision on summary judgment it must construe the facts in the light most favorable to the Petitioner. See Wilson v. Flynn, 429 F.3d 465, 466 (4th Cir. 2005). p.3 But its decision utterly failed to give the Petitioner the benefit of the standard for summary judgment.

Indeed the Fourth Circuit's opinion concedes, as it must, that "[t]he record evidence viewed in the light most favorable to the Estate, supports the conclusion that when Rodgers initially emerged from his vehicle, his hands were up, and they were empty." It has long been recognized that police officers often exercise a great deal of discretion at the street level that is out of the presence of their supervisors. See Joseph Goldstein, Police Discretion Not to Invoke the Criminal Process & Law - Visibility Decisions in the Administration of Justice, 69 Yale L. J. 543, 552-53 (1960).

There is already great difficulty in successfully suing individual police officers because of immunity. See Derek

W. Meineche, Note Assessment of Conduct During High-Speed Chases in State Tort Liability Cases: The Effects of Fiser v. City of Detroit, 46 Wayne L. Rev. 325 (2000) (discussing generally the problem of obtaining civil judgments against police). The Fourth Circuit's opinion improperly raises the barrier, crippling Petitioners' valid claims for relief.

CONCLUSION

After participating in a high speed chase of the Decedent, an off duty Farrow stood upon the hood of his patrol vehicle, in fear of K-9 Officer Brejhar, who was out of control and had just bitten Officer McFarlane and fired with others a total of twenty-three rounds at an unarmed, compliant Tarik K. Rodgers killing him. Farrow violated Rodgers' rights. Sheriff Roach in his individual and official capacity as head of the Martin County Sheriff's Department allowed it to happen by failing to train and supervise Farrow. Waters who also participated in the high speed chase of the Decedent, had alerted participating officers via radio communications that he was going to release the K-9 Officer upon the Decedent at the end of the case. Waters without any verbal warning commanded his dog to apprehend Tarik K. Rodgers, who had exited his vehicle with his hands in the air and without a weapon therein. Waters violated Rodgers' rights. The City of Williamston and Chief of Police, Steve Smith, allowed it to happen by the negligent training and supervision of its officers.

Brown who also participated in the high speed chase of the Decedent, and after the Decedent's vehicle came to rest, began banging on the driver's side window with his service revolver in an attempt to break the window of a reportedly armed and dangerous suspect, who had a kidnap

victim in his vehicle, telling the Decedent and Freeman to get out. Once the complying Decedent assisted Brown with opening his previously jammed driver's side door, Brown without provocation forcibly grabbed the seat-belted Decedent by the shirt tearing it and when the Decedent reached to disengage the seat-belt unit, Brown yelled "gun." Rodgers then exited his vehicle with his hands in the air and without a weapon therein and soon after was viciously and without warning attacked by the K-9 Officer, then fired at 23 times, struck 8 times to the head and torso, dying at the scene. Brown violated Rodgers' rights. The City of Williamston and Chief of Police, Steve Smith, allowed it to happen by the negligent training and supervision of its officers.

This Court should grant review of the decision of the Fourth Circuit and remand this matter for trial on the merits.

In his concurring and dissenting opinion Judge Gregory properly disagreed with the majorities analysis of the deployment of the police dog by Officer Waters. Judge Gregory reasoned that Officer Waters' deployment of the police dog was objectively unreasonable under the circumstances. Judge Gregory properly observed that the majority opinion misapplied two of the Fourth Circuit's own precedents when it concluded that the "without prior warning" police dog was reasonable. Judge Gregory explained that the majority clearly ignored Vathekan v. Prince Georges County, 154 F.3d 173, 178 (4th Cir. 1998) ("an attack by an unreasonably deployed police dog in the course of a seizure is a Fourth Amendment violation). Judge Gregory further reasoned that the majority also ignored its own similar precedent in Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991), which would have afforded the

Decedent the opportunity to surrender. Judge Gregory noted that the circumstances of the case "as portrayed in the video, provided strong evidence that Rodgers did not have a gun in his hand prior to being engaged by the dog." (Pet.App. 20). Judge Gregory , unlike the majority, properly concludes that Officer Waters' deployment of the dog in this case "without warning against a suspect who was completely surrounded and who as evidenced by the officers own actions, had not drawn his gun or otherwise endangered [him]." (Pet.App. 20). A jury should have had an opportunity to find the officer's actions unreasonable. Because of all the circumstances of the case presented in the foregoing Petition, review by the Court of the opinion of the Fourth Circuit is desirable and in the public interest. See Priester v. City of Riviera Beach, 208 F.3d 919, 926-27 (11th Cir. 2000) (denying qualified immunity to officer who allowed a police dog to attack an arrestee who was already on the ground).

Respectfully submitted,

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